Kimile ak Dangea v MSIG Insurance (M) Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12A-14 OF 2010-II
RAVINTHRAN JC
30 AUGUST 2010

Civil Procedure — Intervention — Application for — Application by insurer to intervene — Road accident — Intention to commit fraud by lodging false police reports — Police report lodged two years after accident — Questionable distance between accident spot and hospital — Party to accident's statement to loss adjuster relating non-involvement in collision

This was an appeal by the appellant against the decision of the session's court to add the insurance company ('the respondent') as a co-defendant. The application to intervene and be added as a co-defendant was made by the respondent. The suit arose when a collision that occurred between a car, where he was a passenger and a van, driven by the first defendant, occurred on 7 March 2005. The appellant suffered serious injuries. The respondent who was the insurer of the van applied to the sessions court to intervene in the suit as a co-defendant. The respondent's main ground to intervene as a co-defendant was the appellant and the first defendant's intention to commit fraud by lodging false police reports relating the accident. Both the appellant and the first defendant only lodged a police report of the accident about two years later on the same day. The accident was alleged to have occurred at 29th Mile, Kuching Serian Road which was 47km from Sarawak General Hospital, Kuching. In the medical case note prepared by the Sarawak General Hospital, the patient was stated to be treated at the Serian Hospital before being transferred to the Sarawak General Hospital on 7 March 2005. The respondent argued that the accident did not occur on the evening of 7 March 2005 due to the distance between Serian and Kuching. Further, the respondent argued that the first defendant allegedly stated to the loss adjuster that he was not involved in the collision on 7 March 2005, claiming he was home at the material time. The main issue for the court's determination was whether s 96 of the Road Transport Act 1987 ('RTA') prevents insurers from intervening.

Held, dismissing the appeal with costs to be taxed:

(1) By virtue of s 96 of the RTA, the respondent as an insurer, was obliged to satisfy any judgment obtained by the appellant against the first defendant. The respondent was a party whose liability to the appellant in respect of the subject matter of the action was directly affected by any order which may be made by the court (*Pegang Mining Co Ltd v Choong*

Sam & Ors [1969] 2 MLJ 52, followed). The aim of s 96 was also to avoid multiplicity of actions. If fraud was only raised at the recovery action stage under s 96, it would necessitate another trial. The application of the respondent fell within the ambit O 8 r 6(2)(b) of the Subordinate Courts Rules 1980 (see para 4).

(2) Order 15 r 6(2)(b) of the Rules of the High Court 1980 ('RHC') did not bar a non-party from being added as a defendant in a case where liability was merely 'contingent' as it was widely worded. 'Contingent' meant 'dependent'. It meant liability depended on a judgment against the first defendant. However, since s 96 enjoined the insurer to pay damages if liability for the accident was proven against the first defendant, another way of looking at the legal position under the said provision was that there was 'an issue' between the plaintiff and the insurer 'connected' with 'relief or remedy' as envisaged by O 15 r 6(2)(b) of the RHC (see para 10).

(3) It would be inimical to the interests of the respondent to step into the shoes of the first defendant at the trial even if the insurance policy allowed them to do so. If the respondent's allegation of fraud was put at abeyance until the action between the appellant and first defendant was concluded, surely there would be another trial at the recovery stage. In the second trial, the crucial issue whether collision between the appellant and the first defendant occurred would come to the fore again and require determination. This would defeat the very aim of O 15 r 6(2) of the RHC which was to avoid multiplicity of actions (see para 10).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan mahkamah sesyen untuk memasukkan syarikat insurans ('responden') sebagai defendan bersama. Permohonan untuk mencelah dan memasukkan defendan bersama telah dibuat oleh responden. Guaman timbul apabila berlaku pelanggaran antara sebuah kereta, yang mana perayu adalah seorang penumpang dan sebuah van, yang dipandu oleh defendan pertama, pada 7 Mac 2005. Perayu telah mengalami kecederaan serius. Responden yang merupakan penanggung insurans van memohon kepada mahkamah sesyen untuk mencelah dalam saman tersebut sebagai defendan bersama. Alasan utama responden untuk mencelah sebagai defendan bersama adalah berdasarkan niat perayu dan defendan pertama untuk melakukan penipuan dengan mengemukakan laporan polis yang palsu bagi kemalangan tersebut. Kedua-dua perayu dan defendan pertama hanya membuat laporan polis mengenai kemalangan tersebut kira-kira dua tahun kemudian pada hari yang sama. Kemalangan tersebut dikatakan telah berlaku di Batu 29, Kuching Serian Road yang terletak 47km dari Hospital Besar Sarawak, Kuching. Dalam nota kes perubatan oleh Hospital Besar Sarawak, pesakit dinyatakan telah dirawat di Hospital Serian sebelum dipindahkan ke Hospital Besar Sarawak pada 7 Mac 2005. Responden

menghujahkan bahawa kemalangan tidak berlaku pada petang 7 Mac 2005 atas sebab jarak antara Serian dan Kuching. Di samping itu, responden menghujahkan bahawa defendan pertama menyatakan kepada *loss adjuster* bahawa dia tidak terlibat dalam perlanggaran pada 7 Mac 2005, dengan mendakwa bahawa dia berada di rumah pada masa material. Isu utama untuk diputuskan oleh mahkamah adalah sama ada s 96 Akta Pengangkutan Jalan 1987 ('APJ') menghalang penanggung insurans daripada mencelah.

Diputuskan, menolak rayuan dengan kos untuk ditetapkan:

(1) Menurut s 96 APJ, responden sebagai penanggung insurans, wajib memenuhi sebarang penghakiman yang diperoleh oleh perayu terhadap defendan pertama. Responden adalah pihak yang liabilitinya kepada perayu berkenaan dengan hal perkara tindakan yang secara langsung mempengaruhi sebarang perintah yang mungkin dikeluarkan oleh mahkamah (*Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, diikut). Tujuan s 96 adalah juga untuk mengelakkan kepelbagaian tindakan. Jika penipuan hanya dibangkitkan di peringkat tindakan pemerolehan semula di bawah s 96, ia akan memerlukan perbicaraan lain. Permohonan responden terangkum di bawah A 8 k 6(2)(b) Kaedah-Kaedah Mahkamah Rendah 1980 (lihat perenggan 4).

(2) Aturan 15 k 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak melarang pihak yang bukan parti daripada dimasukkan sebagai defendan dalam kes di mana liabiliti adalah semata-mata contingent kerana ia dimaktubkan secara meluas. *Contingent* bermaksud bergantung. Ia bermakna liabiliti bergantung kepada penghakiman terhadap defendan pertama. Walau bagaimanapun, memandangkan s 96 memerintahkan syarikat insurans untuk membayar ganti rugi jika liabiliti bagi kemalangan tersebut telah dibuktikan terhadap defendan pertama, satu lagi cara untuk melihat kedudukan undang-undang di bawah peruntukan tersebut adalah bahawa terdapat suatu isu antara plaintif dan penanggung insurans yang berkaitan dengan relief atau remedi seperti yang terdapat dalam A 15 k 6(b) KMT (lihat perenggan 10).

(3) Ia akan memudaratkan kepentingan responden untuk menjadi defendan pertama pada perbicaraan tersebut walaupun polisi insurans membenarkan mereka berbuat sedemikian. Jika dakwaan penipuan responden digantung sehingga tindakan antara perayu dan defendan pertama telah diputuskan, sudah tentu akan terdapat suatu lagi perbicaraan di peringkat pemerolehan. Dalam perbicaraan kedua, isu penting sama ada berlaku perlanggaran antara perayu dan defendan pertama akan berbangkit dan memerlukan pemutusan. Ini akan mengalahkan tujuan A 15 k 6(2) KMT yang bertujuan mengelakkan kepelbagaian tindakan (lihat perenggan 10).]

Notes

For cases on application for intervention, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4345–4351.

Cases referred to

Carpenter v Ebblewhite & Ors [1939] 1 KB 347, CA (refd)
Badruzamani bin Azmi v Kurnia Insurance (M) Bhd [2001] 6 MLJ 481; [2001] 4 CLJ 280, HC (refd)
Chu Yuen Wah v Lee Koh Kwok & Anor [1995] 3 HKC 629, CA (refd)
Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal [2008] 3 MLJ 530, CA (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (folld)
Thomas Alvin Cross v Thomson a/l Thomas & Ors [2005] MLJU 106, ; [2005] 6 CLJ 61, HC (folld)

Legislation referred to

Road Transport Act 1987 s 96, 96(1)
Rules of the High Court 1980 O 15 r 6, 6(2)(b), (2)(b)(ii)
Subordinate Courts Rules 1980 O 8 r 6(2)(b)

Sarbjit Singh Khaira (Joseph Kahell Baleng with him) (Khaira & Co) for the appellant.
Abdul Rahman (Tajang Associates) for the first defendant.
Sunny Si (Caroline Chien with him) (Si & Associates) for the respondent.

Ravinthran JC:

[1] This is an appeal against the decision of the sessions court judge to add the insurance company as a co-defendant. The application to intervene and be added as a co-defendant was made by the insurance company. The plaintiff objected to the application. In this judgment, I shall refer to the plaintiff as the appellant and the insurance company who is the second defendant as the respondent.

BRIEF FACTS

[2] The claim of the appellant is based on an alleged collision that occurred between a car and a van on 7 March 2005. The appellant was a passenger in the car. The first defendant was the driver of the van. The appellant suffered serious injuries. The respondent who is the insurer of the van applied to the sessions court to intervene in the suit as a co-defendant. The grounds of intervention can be stated as follows. Under s 96 of the Road Transport Act 1987 ('RTA'), the respondent would be liable to satisfy any judgment obtained by appellant against the first defendant in respect of third party insurance coverage. The

respondent's main ground to intervene as a co-defendant is the alleged collusion between the appellant and the first defendant to commit fraud by lodging false police reports. In the pleadings and the police report, the appellant stated that the accident occurred on 7 March 2005 at 11pm. The appellant sustained serious injuries which resulted in the amputation of his right leg below the knee. The appellant, however, only lodged a police report in respect of the accident about two years later on 14 April 2007. Curiously, the first defendant also lodged his police report on the very same day as the appellant. The other alleged suspicious circumstance highlighted by counsel for respondent is this. The alleged accident occurred at 29th Mile, Kuching Serian Road which is 47km from Sarawak General Hospital, Kuching. The medical case note prepared by the Sarawak General Hospital states that the patient was treated at the Serian Hospital before being transferred to the Sarawak General Hospital on 7 March 2005. If this is true, the argument of the respondent is that the accident did not occur on the evening of 7 March 2005 due to the distance between Serian and Kuching. The third ground canvassed by the respondent to argue that the claim is fraudulent is the statement alleged to have been made by the first defendant to the loss adjuster that he was not involved in the collision on 7 March 2005 as he was home at the material time. The written statement is exhibited in the affidavit in support of the respondent.

ISSUES

Intervention as co-defendant

[3] The application to intervene was made under O 8 r 6(2)(b) of the Subordinate Courts Rules 1980 which is similar to O 15 r 6 of the RHC 1980. The provision:

> 6(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
>
> (a) …
>
> (b) order any of the following persons to be added as a party, namely —
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

[4] It must be noted that in sub-para (ii) intervention is allowed where a party to an action claims relief or a remedy which will materially affect the non-party-intervener's rights (see *Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal* [2008] 3 MLJ 530). The main issue in the action between the appellant and the first defendant is whether the collision was caused by the negligence of the latter. The determination of this issue in favour of the appellant would necessarily result in an award of damages being made by the court. By virtue of s 96 of the RTA, the respondent as insurer is obliged to satisfy any judgment obtained by the appellant against the first defendant. Therefore, applying the test formulated in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, the respondent is a party whose liability to the appellant in respect of the subject matter of the action is directly affected by any order which may be made by the court. The aim of the above mentioned provision is also to avoid multiplicity of actions. The argument of the respondent is that the first defendant was not involved in the collision but had colluded with the appellant who is making a fraudulent claim. If this matter of fraud is only raised at the recovery action stage under s 96, it would necessitate another trial. Therefore, the application of the respondent falls within the ambit O 8 r 6(2)(b) of the Subordinate Courts Rules.

Whether s 96 of the RTA prevents insurers from intervening?

[5] Section 96(1) which obliges the insurer to satisfy any judgment obtained against an insured reads as follows:

> 96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks.
>
> (1) If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, *then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy*, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements. (Emphasis added.)

[6] In essence, this provision obliges the insurers to satisfy a judgment even if the insurer is entitled to avoid or cancel the policy. The argument of counsel for the appellant is that the liability of the respondent as insurer is only a contingent liability and therefore presently there is no issue between the appellant and the respondent. In support he cited the case of *Badruzamani bin*

Azmi v Kurnia Insurance (M) Bhd [2001] 6 MLJ 481; [2001] 4 CLJ 280. In that case the facts are similar in that the insurer alleged fraud on the part of the plaintiff and sought to intervene in the trial. Vincent Ng J was of the opinion that an insurer can only step into the shoes of the first defendant under the terms of the policy to defend the action but they cannot intervene as co-defendant even if they alleged fraud as that can be dealt with at the recovery action stage. His Lordship said as follows:

> It is my considered opinion that a vehicle insurer's liability under s 96(1) of the Act is a contingent statutory liability — a liability wholly and exclusively created by statute and contingent upon judgment obtained by the claimant. Thus, during the currency of the proceedings between the claimant and the insured, there are no issues — not even fraud — that could be pleaded or litigated until the strict liability provision under s 96(1) is triggered into operation upon conclusion of the trial. The insurers' rights are not prejudiced even if they are not, at this stage, allowed to be made a party since they are not at all in law precluded from pleading fraud during the execution stage. It is trite that fraud, if proven, is a good defence even in cases of strict statutory-liability situations such as s 96(1) of the Act.

[7] Counsel for the appellant also cited the English case of *Carpenter v Ebblewhite & Ors* [1939] 1 KB 347 which was cited in *Badruzamani Azmi v Kurnia Insurans (M) Bhd*. In that case, the issue was whether the insurer should be added as a defendant on the application of the plaintiff. Greer LJ said as follows:

> It seems to me that it is wrong and entirely premature at the present time to determine in this action, or even in a separate action, a dispute which has never arisen between the parties at all. I do not think it would make any difference whether the claim was made in an action against Ebblewhite by joining the insurance company. It would be a claim that ought not to be entertained by the court, because at the time of the claim there was not in existence any dispute between the parties on the only question involved in that action, whether it is part of the action against Ebblewhite or an independent action.

[8] However the case of *Badruzamani Azmi v Kurnia Insurans (M) Bhd* was not followed in a later decision of *Thomas Alvin Cross v Thomson a/l Thomas & Ors* [2005] MLJU 106, ; [2005] 6 CLJ 61,. In that case as well the insurers had reason to suspect the plaintiff's vehicle was the only vehicle involved in the accident. The insurers discharged themselves from acting for the defendant and applied to be added as a co-defendant. In respect of the allegation of fraud, Azhar Ma'ah J said as follows:

> In opposition, counsel for the insurance company argued that they had valid grounds to intervene at this stage in that based on a report made by PLUS it had come to the insurance company's knowledge that there was only one vehicle ie, that of the plaintiff that was involved in the said accident. This gave rise to a suspicion of

fraud involving the two defendants in respect of the plaintiff's claim against them. This had prompted the insurance company to seek leave of the court to intervene or else Road Transport Act 1987, s 96(1) would be triggered against them notwithstanding the alleged fraud by the parties concerned.

[9] Although the case of *Badruzamani Azmi v Kurnia Insurans (M) Bhd* was cited, His Lordship preferred the view expressed in the Hong Kong Court of Appeal case of *Chu Yuen Wah v Lee Koh Kwok & Anor* [1995] 3 HKC 629 that O 15 r 6(2) is wide enough to allow joinder of a party whose liability is only contingent:

> Referring this court to a Hong Kong's Court of Appeal decision in *Chu Yuen Wah v Lee Koh Kwok & Anor* [1995] 3 HKC 629 counsel for the insurance company drew this court's attention to the ratio decidendi of that case ie, jurisdiction under O 15 was wide enough to permit the joinder of a party whose liability to pay was contingent not only upon the outcome of the proceedings which it sought to join but also upon any other event or proceedings. The whole basis of the rule was to enable a person not a party to protect his rights when necessary so that natural justice could be done to him. There was nothing or contrary to the principle in permitting a party to raise alternative defences in the same case. To this principle I can't agree more. The presence of the insurance company before the court would be necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon in accordance with the rule. This view is further fortified by a Privy Council's decision in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52; [1968] 1 LNS 96. It reads, inter alia, '(2) One of the principal objects of O 16 r 11 is to enable the court to prevent injustice being done to a person whose right will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach'.

[10] I respectfully agree with the views expressed by His Lordship Azhar Ma'ah J for the following reasons. Order 15 r 6(2)(b) does not bar a non-party from being added as a defendant in a case where liability is merely 'contingent'. It is widely worded. 'Contingent' means 'dependent'. It means liability is dependent on a judgment against the first defendant. However, since s 96 enjoins the insurer to pay damages if liability for the accident is proven against the first defendant, another way of looking at the legal position under the said provision is that there is 'an issue' between the plaintiff and the insurer 'connected' with 'relief or remedy' as envisaged by O 15 r 6(2)(b). In others words, whether the liability of the insurer is described as 'contingent' or otherwise, it certainly comes within the ambit of O 15 r 6(2)(b)(ii). Coming back to the instant case, the submission of the respondent is that there is evidence to suggest collusion between the appellant and the first defendant. In the premises, it would be inimical to the interests of the respondent to step into the shoes of the first defendant at the trial even if the insurance policy allowed them to do so. If the respondent's allegation of fraud is put at abeyance until the

action between the appellant and the first defendant is concluded, surely there would be another trial at the recovery stage. In the second trial, the crucial issue whether collision between the appellant and the first defendant occurred would come to the fore again and require determination. This would defeat the very aim of O 15 r 6(2) which is to avoid multiplicity of actions.

[11] I shall therefore dismiss the appeal with costs to be taxed unless otherwise agreed.

Appeal dismissed with costs to be taxed.

Reported by Afiq Mohamad Noor